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9 UNITED STATES DISTRICT COURT  
10 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

11 GERETHA R. R.,

12 Plaintiff,

13 v.

14 NANCY A. BERRYHILL, Deputy  
Commissioner of Social Security for  
Operations

15 Defendant.  
16

Case No. 2:17-cv-01474-TLF

ORDER REVERSING AND  
REMANDING THE  
COMMISSIONER'S DECISION TO  
DENY BENEFITS

17 Plaintiff appeals the Commissioner's denial of her applications for disability insurance  
18 and supplemental security income ("SSI") benefits. The parties have consented to have this  
19 matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c), Federal Rule of Civil  
20 Procedure 73; Local Rule MJR 13. For the reasons set forth below, the Commissioner's decision  
21 is reversed and remanded for further administrative proceedings.

22 PROCEDURAL BACKGROUND

23 On August 17, 2011, plaintiff applied for disability insurance and SSI benefits. Dkt. 8,  
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1 Administrative Record (AR) 1203. She alleges she became disabled beginning July 1, 2004. *Id.*  
2 The Commissioner denied the applications on initial administrative review and on  
3 reconsideration. *Id.*

4 Following a hearing, an administrative law judge (“ALJ”) determined plaintiff to be not  
5 disabled. AR 19-40. Plaintiff appealed that decision to this Court, which remanded the matter for  
6 further administrative proceedings based on the stipulation of the parties. AR 1306-1308. On  
7 remand, following an additional hearing, a second ALJ found plaintiff to be not disabled as well.  
8 AR 1203-1218. Specifically, the ALJ employed the Commissioner’s five-step sequential  
9 evaluation process to find that at step five thereof, plaintiff could perform other jobs existing in  
10 significant numbers in the national economy. AR 1209-1218.

11 Plaintiff seeks reversal of the ALJ’s decision and remand for an award of benefits or, in  
12 the alternative, for further administrative proceedings.

#### 13 STANDARD OF REVIEW

14 The Court will uphold an ALJ’s decision unless it is: (1) based on legal error; or (2) not  
15 supported by substantial evidence. *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017).  
16 Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate  
17 to support a conclusion.” *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir. 2017) (quoting  
18 *Desrosiers v. Sec’y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir. 1988)). This requires  
19 “more than a mere scintilla,” though “less than a preponderance” of the evidence. *Id.* (quoting  
20 *Desrosiers*, 846 F.2d at 576).

21 The ALJ is responsible for determining credibility, and for resolving any conflicts or  
22 ambiguities in the record. *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th  
23 Cir. 2014). If more than one rational interpretation can be drawn from the evidence, then the  
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1 Court must uphold the ALJ's interpretation. *Trevizo*, 871 F.3d at 674-75. That is, where the  
2 evidence is sufficient to support more than one outcome, the Court uphold the decision the ALJ  
3 made. *Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008). The Court,  
4 however, may not affirm by locating a quantum of supporting evidence and ignoring the non-  
5 supporting evidence. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).

6 The Court must consider the administrative record as a whole. *Garrison v. Colvin*, 759  
7 F.3d 995, 1009 (9th Cir. 2014). The Court also must weigh both the evidence that supports, and  
8 evidence that does not support the ALJ's conclusion. *Id.* The Court may not affirm the decision  
9 of the ALJ for a reason upon which the ALJ did not rely. *Id.* at 1010. Rather, only the reasons the  
10 ALJ identified are considered in the scope of the Court's review. *Id.*

#### 11 ISSUES FOR REVIEW

- 12 1. Whether the ALJ erred in failing to comply with the Court's prior  
13 remand order?
- 14 2. Whether the ALJ erred in failing to properly evaluate the 2011, 2012,  
15 2013, and 2016 opinions from Raji Venkateswaran, M.D., as well as  
the opinion evidence from Donna Nickelberry, MSW, Auky VanBeek,  
PA-C, and Allen Lee, M.D.?
- 16 3. Whether the ALJ erred in finding plaintiff had the residual functional  
17 capacity ("RFC") to perform light work?
- 18 4. Whether the ALJ erred in failing to find plaintiff disabled as directed  
by the Commissioner's Medical Vocational Guidelines?

#### 19 HOLDING

20 After carefully considering each of the issues plaintiff has raised, along with the ALJ's  
21 decision and the administrative record, the Court holds the ALJ erred in failing to properly  
22 evaluate Dr. Venkateswaran's 2011 opinion. Because of that error, the ALJ's determination of  
23 non-disability is not supported by substantial evidence and accordingly is reversed. The Court  
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1 remans this matter, but solely for further consideration of Dr. Venkateswaran’s 2011 opinion in  
2 relation to plaintiff’s ability to function for the 12 month period following Dr. Venkateswaran’s  
3 issuance of that opinion.

#### 4 DISCUSSION

##### 5 I. *The ALJ’s Evaluation of the Medical Opinion Evidence*

6 An ALJ must give “clear and convincing” reasons supported by substantial evidence to  
7 reject a treating or examining physician’s uncontradicted opinion. *Revels v. Berryhill*, 874 F.3d  
8 648, 654 (9th Cir. 2017). Even where contradicted, the ALJ may reject a treating or examining  
9 physician’s opinion only by providing “specific and legitimate” reasons that are supported by  
10 substantial evidence. *Id.*

11 The ALJ can meet this requirement by setting out a detailed and thorough summary of  
12 the facts and conflicting evidence, stating his or her interpretation thereof, and making findings.  
13 *Revels*, 874 F.3d at 654. The ALJ generally must weigh a treating physician’s opinion more  
14 heavily than an examining physician’s, and an examining physician’s opinion more heavily than  
15 a non-examining (reviewing) physician’s. *Ghanim v. Colvin*, 763 F.3d 1154, 1160 (9th Cir.  
16 2014). A non-examining (reviewing) physician’s opinion is not by itself sufficient to justify  
17 rejecting the opinion of either an examining or a treating physician, *Revels*, 874 F.3d at 655,  
18 though it can constitute substantial evidence if “it is consistent with other independent evidence  
19 in the record.” *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001).

20 The ALJ need not discuss every item of evidence presented, *Hiller v. Astrue* 687 F.3d  
21 1208, 1212 (9th Cir. 2012). However, the ALJ “may not reject ‘significant probative evidence’  
22 without explanation.” *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995). In addition, the  
23 ALJ may reject even a treating physician if it is “brief, conclusory, and inadequately supported”  
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1 by objective medical findings or “the record as a whole.” *Batson v. Comm’r of Soc. Sec. Admin.*,  
2 359 F.3d 1190, 1195 (9th Cir. 2004).

3 Plaintiff’s treating physician, Raji Venkateswaren, M.D., completed a physical functional  
4 assessment form dated October 26, 2011, opining that plaintiff had postural, gross or fine motor  
5 skill, and environmental restrictions. AR 113. Dr. Venkateswaren further opined that plaintiff  
6 could sit for most of the day, walk or stand for brief periods, lift a maximum of 20 pounds and  
7 two pounds frequently. AR 1113. Dr. Venkateswaran expected plaintiff’s “work function” to be  
8 impaired for a period of 12 months. *Id.*

9 Plaintiff argues the ALJ erred by not addressing this opinion in her decision. The Court  
10 agrees. Defendant argues no error was committed, because ALJ Dethloff discussed that opinion  
11 in the prior decision and the ALJ incorporated that discussion by reference. Dkt. 11, p. 3 (citing  
12 AR 32, 1204). Because the prior ALJ’s reasons for giving limited weight to Dr. Venkateswaren’s  
13 opinion were proper, defendant goes on to argue, and because other evidence in the record –  
14 which the ALJ referenced – support those reasons, the Court should find no further explanation  
15 by the ALJ was needed.

16 The ALJ stated that while the prior ALJ’s decision was vacated, it remained in the record  
17 “as a summary and discussion of the evidence and is being incorporated into this decision for  
18 that purpose and to the extent that it is consistent with the findings below.” AR 1204.

19 There is nothing to indicate from the above language that the ALJ agreed with or relied  
20 on the specific reasons the prior ALJ gave for giving limited weight to the 2011 opinion, or even  
21 that the ALJ intended to or in fact did discount it. That the ALJ simply failed or decided not to  
22 address that opinion is bolstered by the fact that the ALJ expressly discussed and gave specific  
23 reasons for rejecting Dr. Venkateswaran’s 2012 opinion, which the prior ALJ also addressed in  
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1 his opinion. AR 34, 1213-1214. The ALJ gave no reason why she chose to address the latter  
2 opinion but not the former.

3 Accordingly, because the RFC assessment the ALJ adopted does not incorporate all of  
4 the functional limitations found by Dr. Venkateswaran's 2011 opinion (AR 1209), the ALJ erred  
5 by failing to explain why "significant probative evidence has been rejected." *Flores*, 49 F.3d at  
6 570-71.<sup>1</sup>

## 7 II. *Remand for Further Administrative Proceedings*

8 Plaintiff seeks reversal and remand for an award of benefits. "The decision whether to  
9 remand a case for additional evidence, or simply to award benefits[,] is within the discretion of  
10 the court." *Trevizo*, 871 F.3d at 682 (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir.  
11 1987)).

12 A direct award of benefits would be warranted if the following conditions are met: First,  
13 the record has been fully developed; second, there would be no useful purpose served by  
14 conducting further administrative proceedings; third, the ALJ's reasons for rejecting evidence

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15 <sup>1</sup> Plaintiff also argues the ALJ erred in failing to address the December 2004 opinion of Auky VanBeek, PA-C (AR  
16 383), and the April 2007 opinion of Allen Lee, M.D. (AR 754). However, at the outset of her decision the ALJ noted  
17 that plaintiff failed to appeal the initial denial of concurrent previous applications for disability benefits she had filed  
18 on January 9, 2007. AR 1204. Those applications were denied on May 18, 2007. *Id.* Because plaintiff did not appeal  
19 that denial, the ALJ found the denial to be administratively final and would not be reopened. *Id.* (citing 20 C.F.R. §  
20 404.987(a) ("Generally, if you are dissatisfied with a determination or decision made in the administrative review  
21 process, but do not request further review within the stated time period, you lose your right to further review and  
22 that determination or decision becomes final."); 20 C.F.R. § 416.1487(a) (same)). Accordingly, the ALJ determined  
23 that despite an alleged onset date of disability of July 1, 2004, the relevant period for determining benefits eligibility  
24 began May 19, 2007. AR 1204. The ALJ, furthermore, expressly stated that "[w]hile the evidence discussed below  
may refer to evidence dated prior to this date, these references are merely used to establish a longitudinal picture of  
the claimant's medical history, and do not constitute an implied reopening of her previous claim(s)." *Id.*; see *Lester*  
*v. Chater*, 81 F.3d 821, 827 (9th Cir. 1995) (the Commissioner may apply administrative *res judicata* "to bar  
reconsideration of a period with respect to which [the Commissioner] has already made a determination, by  
declining to reopen the prior application"). And while there is an exception to the application of administrative *res*  
*judicata* "where the Commissioner considers 'on the merits' the issue of the claimant's disability during the already-  
adjudicated period" (*Lester*, 81 F.3d at 827), such is not the case here since, as just noted, the ALJ expressly stated  
that any discussion of evidence from the prior adjudicated period did not constitute an implied re-opening of the  
prior claims. *Krumpelman v. Heckler*, 767 F.2d 586, 588 (9th Cir. 1985) ("[W]here the [ALJ's] discussion of the  
merits is followed by a specific conclusion that the claim is denied on *res judicata* grounds, the decision should not  
be interpreted as re-opening the claim and is therefore not reviewable.").

1 (claimant's testimony or medical opinion) are not legally sufficient; fourth, if the evidence that  
2 was rejected by the ALJ were instead given full credit as being true, then the ALJ would be  
3 required on remand to find that the claimant is disabled; and fifth, the reviewing court has no  
4 serious doubts as to whether the claimant is disabled. *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9<sup>th</sup>  
5 Cir. 2017) (amended January 25, 2018); *Revels*, 874 F.3d at 668.

6 If an ALJ makes an error and there is uncertainty and ambiguity in the record, the district  
7 court should remand to the agency for further proceedings. *Leon*, 880 F.3d at 1045 (quoting  
8 *Treichler v. Comm'r of Social Sec. Admin.*, 775 F.3d 1090, (9th Cir. 2014). If the district court  
9 concludes that additional proceedings can remedy the errors that occurred in the original hearing,  
10 the case should be remanded for further consideration. *Revels*, 874 F.3d at 668.

11 Here, remand for further administrative proceedings rather than a direct award of benefits  
12 is warranted. As discussed above, the ALJ erred only in regard to failing to address the 2011  
13 opinion of Dr. Ventakeswaran, and -- given that Dr. Venketaswaran indicated plaintiff would be  
14 restricted as found for a period of 12 months -- further consideration of the record on remand  
15 should be limited to that period of time following the date of the 2011 opinion.

#### 16 CONCLUSION

17 Although the ALJ determined at step five of the sequential disability evaluation process  
18 that plaintiff had the RFC to make an adjustment to other work (AR 1217-1218), the ALJ erred  
19 in evaluating Dr. Venketaswaran's 2011 opinion -- which assessed greater restrictions for the 12  
20 month period following the issuance of that opinion than the ALJ found. The ALJ's RFC, and  
21 therefore his step five determination, thus are not supported by substantial evidence for that 12  
22 month period.

23 Accordingly, the Commissioner's decision to deny benefits is REVERSED, and this  
24 matter is REMANDED for further administrative proceedings in accordance with the findings  
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1 contained herein.

2 Dated this 11th day of December, 2018.

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6 Theresa L. Fricke  
7 United States Magistrate Judge  
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